BANQUE NATIONALE DE PARIS

v.

SHIN HONG HANG ENTERPRISE PTE. LTD. & ORS.

HIGH COURT, SINGAPORE
LAI KEW CHAI J
[SUIT NO. 6472 OF 1984]
11 MAY 1988

CIVIL PROCEDURE: *Application for leave to appeal out of time - Stay of execution granted by High Court - Subsequent decision by Court of Appeal in another case on same issue of law - Whether that ruling constituted special circumstances.*

This was an application by the applicant/plaintiff for leave to appeal out of time and for leave to appeal against the decision of the High Court which granted a stay of execution in respect of the judgment entered for the plaintiff against the first defendant and the decision of the High Court whereby a stay of execution was granted to the other defendants pending the trial of the counter-claim by the first defendant. The application was made pursuant to s. 34(2), Supreme Court of Judicature Act and O. 56, Rules of Supreme Court 1970. There was delay of 2 years 5 months in making the application in respect of the first decision and a delay of 11 months in respect o the second decision. The claims against the first defendant was in respect of banking facilities granted by the plaintiff. The other defendants were sued as guarantors. There was a clause in the guarantee which took away the common law right of the guarantor to avail themselves of the counterclaim of the principal debtor. After the High Court had granted a stay of execution, the Court of Appeal decided in another case that the guarantor could not avail themselves of any counterclaim by the principal debtor if they had given up at that right. The applicant contended that if that ruling had been made at the material time, the stay of execution of the judgment against the second, third and fourth defendants would not have been granted.

Held:

The delay in making the application was inordinate. The applicant had not shown that there were special circumstances in order for the application to be allowed. The decision by the Court of appeal in respect of the exclusion of the right of guarantors to avail themselves of a counter-claim by the principal debtor was not a sufficient ground to allow the application.

[Application dismissed with costs.]

Cases referred to:

P.H. Grace Pte. Ltd. & Ors. v. American Express International Banking Corporation [1987] 1 MLJ 437

Property and Reversionary Investment Corporation Ltd. v. Templar & Anor. [1978] 2 All ER 433

Legislation referred to:

Rules of the Supreme Court 1970 [Sing], O. 56
Supreme Court of Judicature Act (Cap 322) [Sing], s. 34(2)

Other source referred to:

Supreme Court Practice 1988, para. 59/4/4

For the plaintiffs/applicants - Yoong Tat Choy
For all the defendants/respondents - Teo Guan Teck

JUDGMENT

Lai Kew Chai J:

By summons-in-chambers No. 6766 of 1987 filed as late as 6 October 1987 the plaintiffs sought leave to appeal and for leave to appeal out of time to the Court of Appeal against the order I made on 16 May 1985 whereby I entered judgment against the 1st defendants in the sum of RM47,712.80 interest and costs on a current account and whereby I ordered that the plaintiffs do stay execution against the 1st defendants as the principal debtors and against the 2nd, 3rd and 4th defendants who were sued as guarantors. By prayer 3 of the same summons-in-chambers No. 6766 of 1987 the plaintiffs also sought leave to appeal and leave to appeal out of time to the Court of Appeal against any decision made on 17 November 1986 whereby I allowed the decision of the Registrar ordering a stay of execution against the 2nd, 3rd and 4th defendants pending the trial of the counterclaim of the first defendants to stand. By prayer 4 the plaintiffs sought leave to appeal out of time in respect of the aforesaid two decisions I made. It will be seen that the plaintiffs' applications were made after a delay of about 2 years and 5 months after my first order was made and almost 11 months after my second decision was made. It should also be noted that the plaintiffs had not appealed against the Registrar's order of stay of execution against the 2nd, 3rd and 4th defendants which was made on 30 August 1985.

The plaintiffs' applications first came up before me for hearing on 9 November 1987. As the defendants were served with the affidavits only on 7 November 1987, the applications had to be adjourned to a date to be fixed after the year end vacation. The matters have come up again today for consideration.

To understand how the plaintiffs' applications have arisen, I need to recite the procedural history of this case. In this action, the plaintiffs as bankers claimed the sum of RM47,212.80, interest and costs against the 1st defendants for banking facilities, including overdraft facilities. The plaintiffs also claimed against the 2nd 3rd and 4th defendants as guarantors under a written guarantee dated 12 April 1984.

On 8 October 1984 the plaintiffs took out an application only against the 1st defendants for summary judgment. No application was made against the 2nd 3rd and 4th defendants presumably because they had not been served with the writ. In an affidavit filed on behalf of the 1st defendants by the 2nd defendant on 8 November 1984, it was not disputed that the 1st defendants had overdrawn their current account with the plaintiffs in the amount claimed, but it was alleged that the plaintiffs had agreed to grant banking facilities to the 1st defendants up to $500,000, as evidenced by that amount stated in the guarantee exhibited, and that pursuant to that agreement, the 1st defendants had in April 1984 entered into two contracts for the purchases of timber from sellers in Indonesia under which the 1st defendants had paid deposits totalling $128,000 and under which the 1st defendants had undertaken to the sellers and intended to cause the plaintiffs to issue two letters of credit to pay for the timber. The 1st defendants further alleged that in breach of the contract for banking facilities, the plaintiffs wrongfully refused to open the letter of credit by reason of which the said deposits were forfeited by the sellers of the timber and that consequently the 1st defendants had suffered damages and losses. I need not describe the terms of the contracts for the purchases of timber save to make the general observation that copies of the relevant contemporaneous documents were exhibited which plainly established that the 1st defendants had a *bona fide* counterclaim against the plaintiffs in a sum not less than $128,000 which obviously would overtop the plaintiffs' claim of $47,712.80.

At the conclusion of the hearing for summary judgment, the Assistant Registrar gave the 1st defendants conditional leave to defend which they could do if they paid the sum claimed into Court or, furnished a bank guarantee within 21 days, failing which judgment would be entered against the 1st defendants. However, the Assistant Registrar granted a stay pending an appeal by the 1st defendants.

Not satisfied with this decision, the 1st defendants appealed. At the conclusion of the appeal before me on 16 May 1985 I set aside the decision of the Assistant Registrar and entered judgment against the 1st defendants as the debt was plainly due and because I saw no reason why the plaintiffs should be put to additional expenses and trouble to prove their claim in a trial. In view of the overtopping counterclaim, which on the affidavit evidence was plainly *bona fide* and substantial, I ordered a stay of execution against all the defendants. On a review of the file and on reflection, I must say that the order of stay of execution against the other defendants was unnecessary and unwarranted.

As for the claims against the 2nd, 3rd and 4th defendants under the guarantee, the plaintiffs took out a separate application for summary judgment on 4 February 1985. The hearing was before the Registrar on 30 August 1985 at the conclusion of which the Registrar entered judgment against the 2nd, 3rd and 4th defendants but he ordered a stay of execution pending the trial of the counterclaim of the 1st defendants.

An appeal was lodged by the 2nd, 3rd and 4th defendants against the decision of the Registrar. No appeal was lodged by the plaintiffs; not even against the stay of execution ordered by the Registrar. I heard the appeal on 17 November 1986. At the hearing, Counsel for the plaintiffs referred to the full text of the guarantee signed by the appellants. He mentioned that the guarantee exhibited in the 1st defendants' affidavit filed on 8 November 1984 was not the complete text, having omitted pp. 2 and 3 thereof which contained clauses 3 to 19, and that a clause of the guarantee had taken away the common law right of the 2nd, 3rd and 4th defendants to avail themselves, as sureties, of the counterclaim of the principal debtor. I ruled that since the plaintiffs had not filed an appeal against the stay of execution pending trial of the counterclaim as ordered by the Registrar, the plaintiffs could not be heard on this point.

So far as the appeal of the 2nd, 3rd and 4th defendants were concerned, I dismissed it for the same reasons which operated in the appeal of the 1st defendants.

To summarise, the proceedings in this action as on 17 November 1986 had reached the following stages. Judgment had been entered against all four defendants in the sum claimed. The stay of execution which I ordered on 16 May 1985 in favour of the 1st defendants was in force. So far as the 1st defendants were concerned, the order for stay of execution in their favour was not challenged because of any term in their contract with the plaintiffs. So far as the 2nd, 3rd and 4th defendants were concerned, the Registrar had ordered a stay of execution in their favour on 30 August 1985. That order remained in force since the plaintiffs had not lodged any appeal.

On 6 October 1987 the plaintiffs, as I had mentioned earlier, applied by summons-in-chambers for leave to appeal to the Court of Appeal and for leave to lodge the notice of appeal out to time. As can be gleaned from the affidavit filed by the plaintiffs' solicitor on 6 November 1987, what prompted the application was the decision of the Court of Appeal as reported in *P.H. Grace Pte. Ltd. & Ors. v. American Express International Banking Corporation* [1987] 1 MLJ 437. The Court of Appeal ruled that on a true and proper construction of the guarantee in that case a stay of execution should not have been ordered in favour of the sureties who

had by the terms of the contract of guarantee given up their common law right to avail themselves of any counterclaim of the principal debtors. It would appear that the professional advisers of the plaintiffs had formed the view that, similarly, the 2nd, 3rd and 4th defendants had by the terms of clause 11 of the guarantee in the instant case, read with the whole guarantee, given up their common law right to avail themselves of the counterclaim of the 1st defendants. it was therefore contended on behalf of the plaintiffs that had this clear ruling been available at the material time, this Court would not have allowed the Registrar's decision ordering a stay to stand. It should be noted that I had ruled on this matter solely on the basis that the plaintiffs had not appealed against the Registrar's decision.

The plaintiffs' application is made under O. 56 of the Rules of Supreme Court 1970 and under s. 34(2) of the Supreme Court of Judicature Act, Cap. 322. Counsel for the plaintiffs drew my attention to para. 59/4/4 of the 1988 Supreme Court Practice and after pointing out that the matter was in the discretion of the Court, he said that the factors normally taken into consideration by a Court are: (1) the length of delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding; and (4) the degree of prejudice to a would-be respondent if leave is granted. He pointed out the obvious fact that this list was not exhaustive.

Counsel for the plaintiffs conceded, as he had to, that the delay was inordinately long; that the principle as applied in *Grace's* case did not apply to the 1st defendants, the principal debtors, and that the plaintiffs had not appealed against the order of the Registrar on 30 August 1985 granting stay of execution in favour of the 2nd, 3rd and 4th defendants and that to allow leave to appeal to the Court of Appeal would have the effect of dispensing with an appeal by the plaintiffs to the High Court.

But Counsel for the plaintiffs relied on *Property and Reversionary Investment Corporation Ltd. v. Templar & Anor.* [1978] 2 All ER 433 where a landlord was granted leave to appeal to the Court of Appeal owing to the special circumstances shown, although there was a delay of about two years and seven months. It has to be borne in mind that in that case Judge Fay Q.C. had on 1 November 1974 dismissed the landlord's action for increased rent under a rent review clause because steps were not timeously taken. In doing so, he had apparently followed two Court of Appeal decisions which were subsequently overruled by the House of Lords only on 23 March 1977. In June 1977 the landlord applied to the Court of Appeal for leave to appeal. The predisposing factor in that case was the unfairness of allowing the parties' rights and obligations under the lease to be governed, and continued to be governed until the new rental review, on a construction of the rent review clause which had been overruled by the House of Lords. I dare say there must have been many other similar cases involving similar rent review clauses. The other factor, which may not be of equal importance, was the landlord's undertaking that if the appeal succeeded they would not claim any increased rent in respect of any rent payable before Midsummer's Day 1978. On those special circumstances, leave was granted by the Court of Appeal.

It is quite plain to me that no such special circumstances exist in the present case which is miles away from Templar's case. There can be no question of granting leave to appeal so far as the 1st defendants are concerned. So far as the other defendants are concerned, what happened was that the plaintiffs had not lodged an appeal against the stay of execution ordered by the Registrars on 30 August 1985 and having failed to give notice to the defendants concerned, I ruled that the plaintiffs could not refer to the terms of the guarantee to say that the stay was unwarranted. The plaintiffs did not apply for leave to appeal against the Registrar's decision out of time; nor was an appeal immediately lodged against my ruling.

Neither did the plaintiffs ask for further arguments. Instead the plaintiffs had taken several further steps in these proceedings. In all the circumstances, I am of the view that the plaintiffs have waived their contractual right, if any, under the guarantee to prevent the 2nd, 3rd and 4th defendants from availing themselves of the counterclaim of the 1st defendants for the procedural purposes of staying execution of the judgments entered against them. The delay in the plaintiffs' receipt of the judgment sum may be compensated by an award of interest. On the other hand to grant leave against the 2nd, 3rd and 4th defendants would raise the questions whether they should be given leave to appeal against the judgments entered against them. All considered, I therefore dismissed the application with costs.

Also found at [1988] 2 CLJ 135